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No. 81-48

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JACK KEELER and GRACE KEELER, et al.,

Petitioners,

against

DANIEL W. JOY, individually and as Commissioner of the office of Rent and Housing Maintenance of the City of New York Department of Housing, Preservation and Development,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counter-Statement of Questions Presented

The basic procedure to determine entitlement of a landlord to evict under rent control is an informal administrative proceeding to determine whether the landlord satisfies the essentially simple rent control requirements. The administrative procedure includes notice to the tenant, opportunity to rebut the landlord's evidence, to be represented by counsel, to be heard at an informal conference or hearing, the right to an administrative appeal, and to judicial review in the courts.

Following are the issues presented below and in this petition:

1. Does the overall administrative procedure employed afford the tenants due process, considering the nature of the issues in the administrative proceeding?

The Courts below found that due process was provided.

2. Did the District Court below have sufficient information in the record before the court from the administrative records of the 19 plaintiffs to find that there were no substantial, relevant, or material issues of fact outstanding, that the procedures employed satisfied due process requirements, and that the defendant was entitled to summary judgment based on his request therefor in opposition to plaintiffs' motions for summary judgment.

The District Court granted declaratory judgment to defendant Rent Commissioner based on material in the record presented in opposition to the plaintiffs' motions for summary judgment, and the Court of Appeals affirmed.

Counter-Statement as to Parties to Proceeding

The persons listed in the footnote on petitioners' page ii were among the 19 plaintiffs in the District Court actions. However only 7 of the 19 appealed to the Court of Appeals, i.e. Jack and Grace Keeler, Ralph Gulvino, Elizabeth Kravitz, Lee Fagin, Caterina Stolfi, and Angelo Criscio. Class action status was denied at the District Court.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counter-Statement of the Case

A. The Nature of the Case

This is a test case constitutional challenge by tenants against the procedures and methods of the New York City rent agency for handling eviction cases, in use by the State and City rent control agencies since at least 1950, patterned on federal OPA and OHE procedures in effect from 1943.

The New York City Rent Control Law specifies that the New York City rent agency "shall" issue an administrative order granting a Certificate of Eviction (authorizing the landlord to commence a dispossess proceeding in the courts) where an owner with sufficient equity in his property seeks possession of a rent controlled tenant's apartment for his own use and occupancy or for use and occupancy by a member of the landlord's "immediate family", upon a showing of "good faith" and, in certain cases, upon an additional showing of "immediate and compelling necessity".

The law in New York State is well settled that "good faith" means an owner's honest intention and desire to gain possession for his own occupancy or for occupancy by members of his immediate family. Where the apartment is located in a building containing 12 or less apartments, and the landlord does not already live in the building and seeks the apartment for his own use, then he does not even have to establish an immediate and compelling necessity, and he need only establish that he will in good faith occupy the apartment. The New York City Rent & Eviction Regulations implement the New York City Rent Control Law and define who is included in "immediate family" and also

define the landlord's minimum financial ownership interest for such applications as twenty percent of the purchase price.

Every proceeding is adversary with notice to the affected tenants of everything material that is considered. An aggrieved party has the right to an administrative appeal (protest proceeding), plus judicial review by Article 78 proceeding in the New York Supreme Court, followed by appeals to the Appellate Division, the Court of Appeals and, if a substantial constitutional question is involved, to the United States Supreme Court.

The challenged procedures were specifically designed to provide informal but careful and thorough inquiry and processing of the contentions of "little landlords" and "little tenants" without their need—unless they preferred otherwise—to hire counsel.

Other grounds for obtaining a certificate of eviction are also provided by the NYC Rent Law, but they are not involved in this litigation. The only proceedings that are challenged by these actions are the simple applications by landlords for their own occupancy, or occupancy by a member of the landlord's immediate family.

The tenants maintain they have a constitutionally protected right to continue to occupy their rent controlled apartment, and that they cannot be deprived of their possession without a trial-type hearing in the rent agency. We contend that the tenants are entitled to no more right to continue possession than the rent control legislation provides. The rent control law, which creates their statutory tenancy, states in several ways that landlords and tenants are entitled to an opportunity to be heard, although not a trial-type hearing. The challenged procedures, which comply with the rent control law, are the full measure of tenants' rights, and the informal proceedings are constitutionally adequate because they do in fact provide all the essential elements of due process.

B. Course of the Proceedings Below

The Keeler case was commenced with 8 plaintiffs on January 8, 1979 in the Eastern District of New York. The Genuard case was commenced with 3 plaintiffs on May 21, 1979 in the Southern District of New York but was transferred to the Eastern District for consolidated consideration with Keeler by Judge Platt. The Genuard plaintiffs were also granted leave to serve four additional (not substitute) complaints, thereby adding 8 more plaintiffs, for a total of 19 plaintiffs in the two actions. Each of the six Keeler and Genuard complaints, which describe in detail each administrative proceeding of its plaintiffs, allege that these plaintiffs' proceedings are typical of those used by the defendant in determining landlord applications for a certificate of eviction.

The defendant's Answers with affirmative defenses explained in detail each plaintiff's then pending administrative proceeding.

The plaintiffs then made two motions for summary judgment and their moving affidavits and detailed supporting statements again placed heavy reliance on claims that the 19 plaintiffs' pending administrative proceedings deprived them of due process.

Defendant's answering affidavits requested that summary judgment be granted in defendant's favor (A-303, A-355). The defendant's summary judgment opposing affidavits and responses to the plaintiffs' Rule 9(g) Statements set forth detailed summaries and explanations of those pending administrative proceedings, to date. In addition, the complete unabridged record of each of those administrative proceedings, originally filed on motions for a preliminary injunction, were updated and supplemented to the date of the summary judgment motions and thereafter. This complete unabridged record of the 19 plaintiffs' administrative proceedings is printed, pur-

suant to order of the Court of Appeals, as Appellee's Supplemental Appendix, pages AA-1 through AA-773.

C. Disposition in the Courts Below

In an 18 page opinion, 489 F. Supp. 568, the District Court (Hon. Thomas C. Platt) ruled that: (1) adequate notice is given to tenants; (2) oral conferences are concededly always held and they are adequate to satisfy due process; (3) a taped or stenographic record and a transcript thereof are not needed; (4) the Keeler plaintiffs' administrative proceeding was properly resolved in the District Rent Office, and they were represented by counsel in the protest proceedings; (5) the proceedings collectively consist of 3 separate notices, 2 opportunities to be heard, de novo consideration on the merits on administrative appeal, adequate record of the proceeding, decision with reasons and Article 78 judicial review in the N. Y. Supreme Court; (6) plaintiffs' statutory expectation as a statutory tenant is no greater than the limited right conferred by the N.Y. City Rent Control Law; (7) the procedures afford ample protection, fulfill due process requirements, and are not constitutionally deficient; (8) significantly, at Footnote 3, the District Court noted the statutory "benefactor" under the NYC Rent Control Law is the property owner, whose beneficence is clearly defined by the statute; the existing administrative procedures which provide the landlord with an opportunity to show the existence of circumstances which meet the statutory standard, and the tenant with the opportunity to contest the existence of those circumstances, are sufficient to protect the tenant's interest in ensuring that the tenant is not dispossessed without the statute requirements having been met; (9) there is a rational basis for providing for administrative hearings in certificate of eviction proceedings and the requirement that non-payment and misconduct cases be heard in the courts. Summary judgment was granted in defendant's favor.

On appeal by 7 of the 19 plaintiffs to the Court of Appeals, that Court affirmed with one dissent. 641 Fed. 2d 1044.

Facts

Petitioners' Administrative Proceedings in the District Rent Office

In each tenant-plaintiff's underlying administrative proceeding, challenged below, a landlord had filed an application in the Brooklyn or Queens District Rent Office for an order granting a certificate of eviction against the plaintiff-tenant. Each application sought possession of the plaintiff's apartment for the landlord's own personal use and occupancy, or for occupancy by a member of the landlord's "immediate family."

Each application was entitled "LANDLORD'S APPLICATION FOR CERTIFICATE OF EVICTION (Occupancy by Landlord or Immediate Family—Section 55 of the Regulations)" (AA-25; AA-51; AA-108; AA-110; AA-137; AA-140; AA-189; AA-241; AA-305; AA-338; AA-361; AA-429; AA-478; AA-521; AA-579; AA-676; AA-738). (These "AA" references are to Appellee's Appendix to the Court of Appeals).

The application form requires the landlord to state such details as how much the landlord paid for the property; when and from whom it was purchased, and relationship if any to the seller; cash paid and source of such funds; the then assessed value; name, address and details including relationship to the landlord of the individual who is to occupy the tenant's apartment.

A copy of each application was sent to the tenant affected, together with a "Notice of Commencement of Eviction Proceedings Before the District Rent Director" which read:

"Attached hereto is a copy of an application for a

certificate filed by your landlord. The facts set forth in the application *may* entitle him to such certificate of eviction *under the provisions of the rent regulations.* You are hereby afforded an opportunity to oppose this application by filing an answer • • •

If you fail to file an answer opposing the application within the time limit specified above, the District Rent Director *may* grant a certificate of eviction.

To the Tenant: This is not an Eviction Notice. You Are Not Required to Move Until Ordered by A Court."

(Italics Added)

(AA-28; AA-53; AA-112; AA-143; AA-193; AA-244; AA-307; AA-340; AA-363; AA-433; AA-480; AA-523; AA-582; AA-740).

Each plaintiff filed an answer in opposition to the application (AA-29; AA-54; AA-114; AA-115; AA-148; AA-150; AA-194; AA-245; AA-308; AA-341; AA-364; AA-434; AA-482; AA-524; AA-583; AA-678; AA-741).

An informal conference or hearing was scheduled in each case, and the Notice of Conference read inter alia:

"All inquiries, communications, allegations, etc., having to do with this proceeding must be submitted in writing, in duplicate. Please do not telephone.

• • •

Both landlord and tenant may be represented by counsel and may bring with them witnesses and written evidence in support of their contentions.

Failure to appear at the time stated may be considered a default and may result in a determination based upon the evidence in the record.

• • •

> 1. Landlord is hereby requested to produce at the hearing, contract, deed, mortgage, closing statement bank books and all other evidence relating to the purchase. • • •"

(AA-30; AA-55; AA-119; AA-152; AA-198; AA-251; AA-310; AA-344; AA-368; AA-437; AA-487; AA-526; AA-590; AA-683; AA-742).

Additional documentation was filed in some of the proceedings such as doctor's statement, certificate of birth registration, title papers, a statement from a child care center, a statement from a medical center, a statement from landlord's son, a deed, etc. (AA-27; AA-32; AA-35; AA-206; AA-255; AA-485; AA-486; AA-527; AA-529; AA-585; AA-591; AA-684; AA-754; AA-759). A co-owner's affidavit was filed in some proceedings (AA-264; AA-269; AA-312; AA-319; AA-369; AA-370). An affidavit from the individual for whom occupancy was sought was filed in some proceedings (AA-33; AA-57; AA-347). In one proceeding, a notice was issued to the landlord to reply to the tenant's opposing answer (AA-249). In one proceeding, the landlord's attorney wrote a letter describing ground floor commercial storage space the tenant claimed the landlord should occupy instead of her apartment (AA-263). A physical inspection by an official rent agency inspector was had in some proceedings (AA-36; AA-265; AA-330; AA-751).

An oral conference or hearing was held in the District Rent Office in each proceeding (AA-279; AA-324). The record of each proceeding contains a Report of Conference, together with the Examiner's summary findings, and decision (AA-31; AA-58; AA-130; AA-154; AA-204; AA-253 and AA-272; AA-316; AA-332; AA-346; AA-372; AA-438; AA-492; AA-532; AA-593; AA-595; AA-686; AA-762). Each proceeding also contains an Examiner's Progress Sheet, containing such entries as the dates, when notices, etc., were issued (AA-38; AA-60; AA-133; AA-162;

AA-213; AA-270; AA-272; AA-321; AA-348; AA-375; AA-441; AA-494; AA-535; AA-597; AA-688; AA-760).

Each proceeding was decided by the Examiner who had seen and heard the parties, Lover Deposition, Appendix—Exhibit D at p. 6 lines 15-17; p. 7 lines 1, 2; p. 13 lines 5-6; p. 18 line 17; p. 19 line 6; A-285; A-329; Warden Deposition, Appendix—Exhibit C at p. 5 lines 1-6; p. 12 lines 8-15; p. 14 lines 18-21. There was no contrary evidence submitted in the motion for summary judgment.

Where the order granted the landlord's application for a certificate of eviction, it specified that the apartment was for occupancy "solely" by the named individuals as represented in the proceeding (AA-39; AA-61; AA-164; AA-217; AA-273; AA-350; AA-376; AA-442; AA-496; AA-537; AA-598; AA-689). In some of the proceedings, the landlord's application was denied (AA-134; AA-135; AA-335); and in another, the proceeding was terminated (AA-163).

Plaintiffs' Protest Proceedings (Administrative Appeal)

Protests (administrative appeals) were filed by 13 tenant plaintiffs (AA-40; AA-63; AA-166; AA-221; AA-275; AA-352; AA-378; AA-444; AA-498; AA-539; AA-600; AA-691; AA-766).

Answers in opposition were filed by 11 of the plaintiffs' landlords (AA-44; AA-69; AA-173; AA-229; AA-280; AA-354; AA-383; AA-460; AA-504; AA-610; AA-698).

In some of the proceedings, a Notice of Opportunity to Submit Evidence was issued (AA-72; AA-100). In other proceedings, additional evidence, such as satisfaction certificate, Veteran's Administration Certificate of Eligibility, mortgage, bond, satisfaction certificate, deed, contract, mortgage note, purchase money mortgage, closing statement, rent receipt, was filed (AA-73; AA-91; AA-158; AA-394; AA-555; AA-613; AA-616; AA-618; AA-621; AA-622.

In some of the protest proceedings, a Notice of Conference was issued (AA-78; AA-178; AA-233; AA-285; AA-392; AA-466; AA-509; AA-548; AA-612). Each such proceeding contains the hearing attorney's report of the hearing (AA-86; AA-289; AA-419; AA-420; AA-468; AA-548; AA-552; AA-623; AA625) and in one of the plaintiffs' protest proceedings, still another hearing was had in the protest proceeding (AA-101).

In one of the proceedings, the Notice of Hearing informed the parties they may provide an interpreter (AA-612).

Each order determining a protest appeal proceeding was decided by the hearing attorney (Rabin Deposition, Appendix—Exhibit E p. 4 line 24—p. 5, line 3; p. 34, line 11-13, 23-24; p. 35, line 25—p. 36 line 2; p. 36, line 12-13; p. 37, line 6; p. 44, line 10-12; Joy Deposition Appendix —Exhibit B p. 8, line 20-25; p. 52, line 5-10; p. 104, line 24—p. 105, line 1-5; p. 110, line 6-9. There was no contrary evidence submitted in the summary judgment application or otherwise.

An Order & Opinion Granting Tenant's Protest was issued in three of the plaintiffs' proceedings (AA-102; AA-185; AA-573); an Order & Opinion Denying Tenant's Protest was issued in six of the plaintiffs' proceedings (AA-48; AA-293; AA-422; AA-473; AA-625; AA-701); and an Order & Opinion Dismissing Tenant's Protest was issued in three of the plaintiffs' proceedings (AA-238; AA-356; AA-516).

In two proceedings, the tenant plaintiff commenced an Article 78 judicial review proceeding in the New York Supreme Court. In the first, *Matter of Bukawyn* v. *Joy*, New York Law Journal, Oct. 11, 1979, p. 6, col. 1, the New York Supreme Court, New York County, denied the petition and dismissed the tenant's Article 78 proceeding, fully upholding the Rent Commissioner's order (AA-297; AA-303). No notice of appeal to the New York Appellate Division was filed, and that order became final

under New York law (A-334-342). In another, *Matter of Stolfi* v. *Joy*, unreported, the tenant's Article 78 proceeding in the New York Supreme Court, Kings County, (AA-629 to AA-652), resulted in a judgment affirming the certificate of eviction, following which the tenant filed a notice of appeal to the Appellate Division but never perfected the appeal.

The Controlling Law and Regulations

The NYC Rent Control Law

The NYC Rent Control Law provides (NYC Admin. Code, see Y51-6.0 subd. b(1) [See in McKinney's Unconsol. Laws, third unnumbered vol. containing sec. 8581 to 8700, p. 421, 423]:

"Sec. Y51-6.0. Evictions

b. * * * no tenant shall be removed or evicted on grounds other than those stated in subd. a of this section unless on application of the landlord the city rent agency shall issue an order granting a certificate of eviction * * * permitting the landlord to pursue his remedies at law. The city rent agency *shall* issue such an order whenever it finds that:

(1) The landlord seeks in good faith to recover possession of housing accommodation because of immediate and compelling necessity for his own personal use and occupancy or for the use and occupancy of his immediate family * * *

(Italics ours)

The NYC Rent Control Law further specifies that an immediate and compelling necessity need not be established under the following circumstances (NYC Admin. Code, sec. Y51-6.0, subd. b.(1) [McKinney's *supra*, p. 423]:

"* * * provided, however, that where the housing accommodation is located in a building containing twelve or less housing accommodations and the landlord does not reside in the building and the landlord seeks in

good faith to recover possession for his own personal use and occupancy, an immediate and compelling necessity need not be established: * * *"

The NYC Rent Control Law does not require trial-type hearings in proceedings as are involved here (Admin. Code, Sec. Y51-8.0, subd. c "Procedure" [McKinney's *supra*, p. 437]:

"Any proceedings under this section may be limited * * * to the filing of affidavits, or other written evidence, and the filing of briefs * * *".

The Regulations

The statutory provisions are implemented by Sec. 55, subd. 2 of the N.Y.C. Rent & Eviction Regulations, which provide (McKinney's, *supra*, p. 541 et seq.):

"Sec. 55. Occupancy by landlord or immediate family a. A certificate *shall* be issued where the landlord seeks in good faith to recover possession of a housing accommodation because of immediate and compelling necessity for his own personal use and occupancy, or for the use and occupancy of his immediate family * * * As used in this paragraph, the term 'immediate family' includes only a son, daughter, grandson, granddaughter, stepson, stepdaughter, father, mother, father-in-law, mother-in-law, grandfather, grandmother, stepfather or stepmother."

(Italics ours)

As to landlord's financial ownership interest, the said Regulations provide (see McKinney's *supra* at p. 546):

"Sec. 55. Occupancy of landlord or immediate family.

* * *

"d. Where the landlord purchased and thereby acquired title to the premises on or after September 17, 1947, no certificate shall be issued under this section

unless the landlord on or before the date of the filing of the application has made a payment or payments totalling at least 20% of the purchase price or the assessed valuation of the premises, whichever is the greater; provided, however, that where the Administrator finds (1) that equivalent accommodations are available for rent into which the tenant can move without substantial hardship or loss, or (2) that undue hardship would result to the landlord a certificate may be issued although less than 20% has been paid. The requirements of this paragraph d shall not apply where the landlord is a former member of the armed forces of the U.S.A. who obtained a loan for use in purchasing housing accommodations guaranteed by the Administrator of Veterans Affairs."

POINT I

The determinations below were correct because the administrative eviction proceedings provided a fair procedure and constitutional due process.

The requirements of procedural due process are not inflexible, but depend upon the circumstances of particular situations. In *Matthews* v. *Eldridge*, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976), this Court stated as to due process in administrative proceedings, at 424 U.S. 348, 349:

"• • • The ultimate balance involved a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness. We reiterate the wise admonishment of Mr. Justice Frankfurter that *differences in the origin and function of administrative agencies 'preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts'. (citing) The judicial model of an evidentiary hearing*

is neither a required, nor even the most effective, method of decision making, in all circumstances. • • • All that is necessary is that the procedures be tailored • • • to insure that they are given a meaningful opportunity to present their case.

• • •

"In assessing what process is due • • •, substantial weight must be given to the good-faith judgments of the individuals of social welfare programs that the procedures they have provided assure fair consideration. • • •"

(Italics ours)

In response to petitioners' claim that tenants are entitled to a hearing prior to eviction from their rent controlled apartments, we contend that the record of this case proves that at least one oral Conference or Hearing is had in *every* proceeding involving an application for a certificate of eviction and more than one is held where needed. Nowhere have the appellants produced a single administrative proceeding where there was no oral Conference or Hearing (A-368; A-369; A-370); (AA-1 through AA-773; Lover Deposition, p. 10, lines 9-17).

The words "conference", and "hearing" (used by defendant interchangeably throughout this litigation), are adversary, due process hearings (A-368-370).

Petitioners' reliance on *Califano* v. *Yamasaki*, 442 U.S. 682 (1979), is misplaced. The six requirements of an oral hearing, referred to in the opinion of the Court (442 U.S. 692) are allowed in the procedures here under attack, including the right to cross-examine. A transcript of the hearing was not required by the Circuit Court of Appeals, 564 F.2d at 1235, or by this Court.

Plaintiffs cite *Goldberg* v. *Kelly*, 397 U.S. 254, 25 L.Ed. 2d 287, 90 S.Ct. 1011 (1970). However, in *Davenport* v.

Altman, 71 Civ. 4263 (S.D.N.Y., Gurfein, D.J.); *aff'd* 492 F.2d 1237; *cert. den.*, 417 U.S. 969, 41 L.Ed.2d 1140, 94 S.Ct. 3173 (1974), a landlord's claim of lack of due process was considered by the District Court in the light of *Goldberg* v. *Kelly*, and was rejected with this language dismissing the complaint:

> "The plaintiff now contends in this case that he was not granted a 'due process' hearing before the determination by the City Rent Administration. But Magistrate Schreiber found and I confirmed that '[D]uring these proceedings, plaintiff was represented by counsel and afforded the opportunity to answer the charge and present evidence in writing (Finding No. 3). That is, in any event, sufficient for due process in rent control cases. Bowles v. Willingham, 321 U.S. 503, 519-520 (1943).'"

Petitioners fail completely to show a constitutionally protected right or "entitlement" to a trial-type hearing. Their asserted "entitlement secured by statute", "statutory entitlement", "right or benefit conferred by legislation" is no greater than the legislation which created it, and the NYC Rent Control Law is therefore the measure of the right conferred and challenged in this action.

In *Wasservogel* v. *Meyerowitz*, 300 N.Y. 125 (1949), the N. Y. Court of Appeals put into perspective a "statutory tenancy." (Desmond, J.):

> "The tenants then stayed in possession, not under the original lease but as statutory tenants only. As such, each tenant * * * was in the landlord's property 'not by virtue of an agreement, express or implied * * * but by virtue of the compulsion which the law exerts on the landlord to allow him to remain'. Stern v. Equitable Tr. Co., 238 N.Y. 267.
>
> * * *

> A statutory tenant holds over not because he has any property right or estate in the premises, but because emergency laws forbid his eviction * * * Bowles v. Willingham, 321 U.S. 503, 64 S.Ct. 641, 88 L.Ed. 892."

With the rent control law's statutory benefits, the tenant must also bear the statute's burdens.

On the other hand, a landlord's right to possession is related to constitutionally protected rights to property. In *Lindsey* v. *Normet*, 405 U.S. 56, 74, 31 L.E.2d 36, 50, this Court stated:

> "Absent constitutional mandate, * * * the definition of landlord-tenant relationships are legislative, not judicial, functions. Nor should be forget that the Constitution expressly protects against confiscation of private property or the income therefrom."

Continuously since 1950, when the then State Legislature and in 1962, when the City Council enacted the rent law, they expressly specified that the rent control agency must issue a certificate of eviction so that a landlord or a member of his immediate family (and in specified instances when there is an immediate and compelling necessity therefor) shall be able to occupy his own property. Unlike a government agency dispensing a benefit such as welfare or disability insurance, a rent control agency proceeding does not involve solely the tenant versus the government. The affected landlord's rights are always involved. For example, in the administrative proceeding affecting plaintiffs Keeler, the administrative record clearly shows the affected landlord (husband and wife) is the owner of a three-family house, occupying one apartment therein and requesting possession of the Keeler ground floor apartment for the wife's mother because the latter, a widow living alone o nthe third (top) floor elsewhere, has been advised by her doctor not to climb stairs as part of her treatment because she had been operated on for a painful tumor of the lower back and she suffers from low back pain, diabetes

mellitus, severe rhematoid arthritis, lumbo sacro spline and knee joint (AA-25; AA-27; AA-31; AA-32; A-123; A-125; A-130).

In other constitutional attacks on the New York City rent control law, the federal courts have repeatedly upheld the law and its administration, *Eisen* v. *Eastman*, 421 F.2d 560 (2d Cir. 1969); *cert. den.* 400 U.S. 841, 91 S.Ct. 82, 27 L.Ed.2d 75 (1970); *Israel* v. *City Rent & Rehabilitation Admin.*, 285 F.Supp. 908 (S.D.N.Y. 1968); *Davenport* v. *Berman*, 420 F.2d 294 (2d Cir.); *cert. den.* 401 U.S. 956, 26 L.Ed.2d 240, 91 S.Ct. 976 (1971); *Mkwanazi* v. *Ken Ray Associates, Inc.*, 410 F.2d 1143, 1144.

Twice recently this Court has dismissed appeals in rent control cases for want of a substantial federal question. *Kaplan* v. *Prince*, 444 US 938 (1979); *Benson Realty* v. *Koch*, —— U.S. ——, 49 L.W. 3530, 101 S.Ct. 933, 67 L.Ed. 2d 106 (1981).

In *Eisen* v. *Eastman*, 421 F.2d 560, 567, 568, 569 (2d Cir.); *cert. den.*, 400 U.S. 841, 91 S.Ct. 82, 27 L.Ed.2d 75 (1970), the Court of Appeals: (a) affirmed dismissal of a civil rights complaint; and (b) commented on the plaintiff's failure to avail himself of available state remedies:

> "• • • *the consequences of compelling federal courts to pass upon all complaints of unconstitutional acts by state and local officials at the lowest level, without any requirement of appeal to higher ones, would be so destructive of proper concepts of federalism and so needlessly burdensome to the federal courts that it is appropriate to determine whether the decisions have not been given a greater sweep than the Court intended.*
>
> "• • • We shall need much clearer direction than the court has yet given or, we believe, will give, before we hold that plaintiff in such cases may turn their backs on state administrative remedies and rush into a federal forum, whether their actions fall under the Civil Rights Act or come under general federal jurisdiction."
>
> (Italics ours)

POINT II

Summary Judgment was proper because there were no material issues of fact to be decided before the District Court.

Petitioners, not the defendant-respondent, selected the particular 19 plaintiffs in 16 administrative proceedings to be used to demonstrate their declaratory judgment complaints alleging constitutionally inadequate and deficient procedures for hearing and determining landlord applications for certificates of eviction.

In addition to the full description of the administrative procedures and proceedings described in the (a) pleadings; (b) the affidavits of both sides on the five motions for a preliminary injunction; (c) the affidavits of both sides on the two motions for summary judgment; (d) the two comprehensive Rule 9(g) Statements by both sides, the District Court also had before it the complete unabridged record of each of the 19 plaintiffs in 16 administrative proceedings. Under the circumstances, the court had a full statement of the claims as articulated by each side plus the complete original papers, so that it was not left in doubt as to any material or relevant issues of fact. The few areas of remaining dispute all clearly involve facts not central to the question of whether the overall rent control procedure substantially provides due process. Quibbles about isolated details do not detract from the broad picture of institutionalized due process derived from reading the complete administrative records of all 19 plaintiffs eviction cases in the record of this case.

The District Court clearly had sufficient data on this record to find that there were no substantial issues of fact outstanding, and that the procedures employed satisfied due process requirements.

The petitioners admitted there were no triable issues of fact when they made their two motions for summary judg-

ment, and they are now taking an inconsistent position when they complain about not having a trial. We agreed there were no triable issues and requested that summary judgment, on plaintiffs' motion, be granted to defendant (A-303, A-355). Petitioners are in error in claiming that the District Court granted summary judgment *sua sponte*. Nevertheless, case law upholds granting of summary judgment even without a request for such relief. The District Court properly granted declaratory judgment to defendant Rent Commissioner, based on the very full record before it. In *Lowenschuss* v. *Kane*, 520 F.2d 255, 261 (2d Cir. 1975), the Court of Appeals held:

> "We have sanctioned a sua sponte award by the court of summary judgment to a non-moving party where it appeared from the papers, affidavits and other proof submitted by the parties that there were no disputed issues of material fact and that judgment for the non-moving party would be appropriate as a matter of law. Local 33, Int'l Hod Carriers Union v. Mason Tenders Dist. Council, 291 F.2d 496, 505 (2d Cir. 1961) • • •"

In *Local 33, Int'l Hod Carriers etc.* v. *Mason Tenders*, 291 F.2d 496 (2d Cir. 1961), the court held (Medina, C. J.):

> "There remains the question whether there is authority to grant summary judgment for defendants in the absence of a cross-motion for summary judgment. It is Professor Moore's view that such a motion would be a mere formality and is unnecessary in a situation such as we have before us, where the proofs before the court show plaintiff has no case. Moore's Federal Practice, vol. 6, pp. 2088-9 • • •"

To the same effect, see:

> 6 Moore's Federal Practice, Sec. 56.12 (2d ed. 1976).

CONCLUSION

For all of the foregoing reasons, the petition for certiorari should in all respects be denied.

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Respectfully submitted,

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